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McNAMEE – ANDREW MCNAMEE VS. DANIEL MCCUSKER TRANSCRIPTION APPEAL

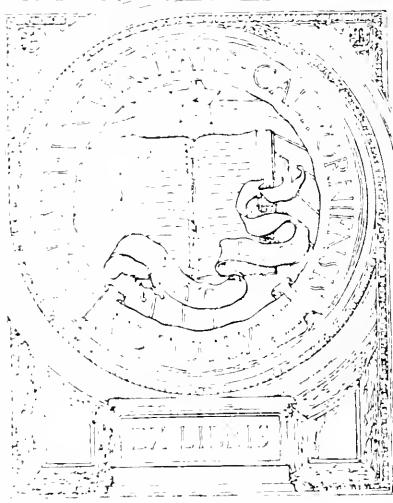
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UNIVERSITY OF CALIFORNIA
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ROBERT ERNEST COWAN

No.

IN THE SUPREME COURT
OF THE
STATE OF CALIFORNIA.

ANDREW McNAMEE,

Respondent,

vs.

DANIEL McCUSKER *et al.*

Appellants.

Transcript on Appeal.

B. S. BROOKS,

for Appellants.

A. CRAIG,

for Respondent.

SAN FRANCISCO :

Women's Union Print, 424 Montgomery Street.

1874.

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IN THE SUPREME COURT
OF THE
State of California.

² *In the District Court of the Third Judicial District
of the State of California, held in and for the
County of Monterey.*

ANDREW MCNAMEE,

Plaintiff,

vs.

DANIEL McCUSKER, W. R. FRISBIE,

JOHN DOE and RICHARD ROE,

Defendants.

³

Complaint.

Andrew McNamee, the above-named plaintiff, a resident of the County of Monterey, State of California, comes and complains of the above-named defendants, D. McCusker, John Doe and Richard Roe, whose real names are unknown to this

plaintiff, and who are therefore sued by the name
4 of John Doe and Richard Roe, and, for cause of
action and complaint, alleges and shows to the
Court.

That heretofore, to wit, on the 14th day of November, A. D. 1867, the said plaintiff was, and ever since has been, and still is, seized in fee-simple of, and was in the lawful possession of the following described premises, situated in the County of Monterey, State of California, bounded and described as follows, namely: being a part of lots numbers 6 and 7 of section number 31 in Township number 12, south of range No. 2 east,
5 beginning at a post marked M 2, on the south-easterly boundary line of the rancho Bolsa de San Cayetano, at the point where the division fence between the lands of D. McCusker and Andrew McNamee intersects the said rancho line, and running thence southwesterly and parallel with said division fence $4\frac{5}{100}$ chains to a fence; thence in a southeasterly direction, and along said last mentioned fence and parallel with the said southern boundary line of said Rancho Bolsa de San Cayetano $43\frac{7}{100}$ chains to the division fence between
6 the lands belonging to A. McNamee and the heirs of L. P. Chapin, deceased; thence north-easterly and along said fence $4\frac{7}{100}$ chains to the said southerly boundary line of said Rancho Bolsa de San Cayetano; thence north $67\frac{1}{100}$ west along said southerly boundary line of said Rancho Bolsa de San Cayetano to the said post marked M 2, the place of beginning, containing $19\frac{7}{100}$ acres of land.

And the plaintiff is lawfully entitled to the
7 possession of the said land and premises.

That afterwards, to wit, on the 14th day of November, A. D. 1867, the defendants wrongfully entered into the possession of said premises, and ousted the plaintiff therefrom, and have ever since held, kept and detained the possession thereof from the said plaintiff, and now unlawfully hold possession of the same from the said plaintiff.

That the rents and profits of the said premises, from the said 14th day of November, A. D. 1867, are of great value, to wit, of the value of five dollars per month, and plaintiff has suffered and
8 still suffers damage by reason of the withholding possession of the said premises in the sum of one hundred dollars.

Wherefore, the plaintiff prays judgment against the said defendant for the possession of the said land and premises, and every part thereof, to the plaintiff, and for damages in the sum of one hundred dollars for the withholding the possession of the premises, together with all the costs of the action.

CRAIG & BARHAM,
Plaintiff's Attorney.

9 (Endorsed) Filed Feb. 24, 1869.

[TITLE OF COURT AND CAUSE.]

Answer.

Come now Daniel McCusker and W. R. Frisbie, defendants named in the above-entitled ac-

tion, and for answer to the plaintiff's complaint
 10 herein made and filed, deny each and every, all
 and singular, generally and specifically, the alle-
 gations therein contained, and say they are all
 untrue in fact.

Wherefore, said defendants pray judgment, that
 they go hence with the costs and disbursements
 herein expended.

JULIUS LEE,

Attorney for said Defendants.

Service of copy of the foregoing answer ac-
 cepted, and the same considered as filed in the
 11 proper Court within the proper time.

March 24, 1869.

CRAIG & BARHAM,
 Attorneys for Plaintiff.

Filed March 25, 1869.

[TITLE OF COURT AND CAUSE.]

Judgment.

This cause coming on to be heard in its regu-
 lar order at the April Term of said Court, A. D.
 12 1870, to wit, the 7th day of April, A. D. 1870,
 and the respective parties appearing by their at-
 torneys, the said cause was tried by the Court with-
 out a jury, and the Court having heard the evi-
 dence of the parties and the argument of coun-
 sel, the Court took said cause under advisement.
 And now at the October Term of said Court, A. D.
 1870, to wit, on the 3d day of October, A. D. 1870,

the Court being sufficiently advised in the premises,
13 rendered its judgment in favor of the plaintiff and against the said defendant, and orders that judgment be entered accordingly.

Wherefore, it is ordered and adjudged that the said plaintiff, Andrew McNamee, do have and recover of and from said defendants, Daniel McCusker and W. R. Frisbie, the possession of all that certain tract of land lying and being situated in the County of Monterey, and State of California, bounded and described as follows, to wit:

Being a part of lots numbers 6 and 7 of section number 31, in Township number 12, south of range No. 2 east, beginning at a post marked M 2, on the southerly boundary line of the rancho Bolsa de San Cayetano at the point where the division fence between the lands of D. McCusker and Andrew McNamee intersects the said rancho line, and running thence southwesterly and parallel with said division fence $4\frac{27}{100}$ chains to a fence; thence in a southeasterly direction, and along said last-mentioned fence and parallel with the said southern boundary line of said Rancho Bolsa de San Cayetano $43\frac{73}{100}$ chains to the division fence between the lands belonging to A. McNamee and the heirs of L. P. Chapin, deceased; thence northeasterly and along said fence $4\frac{27}{100}$ chains to the said southerly boundary line of said Rancho Bolsa de San Cayetano; thence north 67 west along said southerly boundary line of said Rancho Bolsa de San Cayetano to the said post marked M 2, the place of beginning, containing $19\frac{73}{100}$ acres of land.

16 And it is further ordered and adjudged, that the said plaintiff do have and recover of and from the said defendants the sum of seventy-nine dollars, damages, for the withholding of said premises and the possession thereof from the plaintiff by said defendants.

And it is further ordered and adjudged that the said plaintiff do have and recover of and from the said defendants the sum of one hundred and fourteen ⁸⁹ ₁₀₀ dollars, for his costs herein laid out and expended.

The foregoing judgment rendered in open Court, this 3d day of October, A. D. 1870.

17 W. M. R. PARKER, Clerk.

(Endorsed) Filed Oct. 4th, 1870.

[TITLE OF COURT AND CAUSE.]

Notice of Intention to Move for a New Trial.

Please take notice, that the defendant in the above-entitled cause intends to move said Court for a new trial of said cause, on the following grounds, to wit:

18 1st. Insufficiency of the evidence to justify the judgment, or decision, of the Court.

2d. That said judgment, or decision, is against law.

3d. Errors of law, occurring at the trial, and excepted to by said defendant.

JULIUS LEE,

By B. S. BROOKS,

Attorney for Defendant.

To A. CRAIG, Esq., Attorney for Plaintiff.

City and County of San Francisco, ss.

19 William Leviston, being duly sworn, deposes and says, that A. Craig is the attorney for the plaintiff in the above cause, and resides in the town of Watsonville, in the County of Santa Cruz; that, on the 7th day of November, 1870, he served the annexed notice on said Craig, by sending to the U. S. Post-office in said City and County of San Francisco a true copy of said notice, enclosed in an envelope, with the postage thereon duly prepaid, addressed to said Craig at said town of Watsonville.

Wm. LEVISTON.

20 Subscribed and sworn to before me, this 18th day of November, 1870.

[NOTARIAL SEAL.]

JAMES G. CARSON,
Notary Public.

Filed November 21, 1870.

Wm. M. R. PARKER, Clerk.

(Endorsed) Notice of motion for new trial.

Filed Nov. 21, 1870.

W. M. R. PARKER, Clerk

21

[TITLE OF COURT AND CAUSE.]

Notice of Intention to Move for New Trial.

Please take notice, that the defendant in the above-entitled cause intends to move said Court for a new trial of said cause on the following grounds, to wit:

1st. Insufficiency of the evidence to justify the judgment or decision of the Court.

2d. That said judgment or decision is against
22 law.

3d Errors of law, occurring at the trial, and
excepted to by said defendant.

JULIUS LEE,
By B. S. BROOKS.
Attorney for Defendant.

To A. CRAIG, Esq.

I admit due service of the within at Watson-
ville, this 11th day of November, 1870, waiving no
right to move to dismiss.

A. CRAIG,
Attorney for Defendant.

23 Filed May 29, A. D. 1871.

[TITLE OF COURT AND CAUSE.]

Statement on Motion for New Trial and on Appeal.

This cause came on to be tried before the
Judge, sitting without a jury, (a jury having been
waived by both parties, by consent, in open
Court,) on the 7th day of April, 1870, and were
tried together.

24 The plaintiff, upon his own motion, dismissed
the suit as to the defendant, Frisbie.

The plaintiff, to maintain the issues joined, in-
troduced in evidence the following stipulation,
viz :

It was stipulated by and between the re-
spective parties that, in this case, S. W. Smith
will testify that he made a survey of the south-
west boundary of the Ranch of San Cajetano,

running from station "B. S. C. 10," to the
25 southwest corner of the ranch, as called for
in the patent, course north 67° west to the station
on the Pajaro River; that he also ran a line north
 $68\frac{1}{2}^{\circ}$ west from the station "B. S. C. 10." That
he also ascertained that McCusker's fence is
erected on the line north $68\frac{1}{2}^{\circ}$ west.

That said Smith also ascertained, by actual
survey in 1870, the corners of sections 25, 30,
31 and 36, called for in patent, by running
on the Township line one mile north from
the standard, and that the said corner is located
26 two chains and thirty links north of McCusker's
fence or line, north $68\frac{1}{2}^{\circ}$ west, and 3 chains and
70 links south of the line north 67° west.

That said Smith, at the time of making said
survey, was County Surveyor of Monterey Co.,
and that he made a diagram or plat of the south-
west boundary of the rancho, which diagram is
marked "Exhibit A," and is admitted in evidence,
and is made a part hereof.

It is also admitted respectively, that the survey
by which said Smith ascertained the position of
the section corners, was made subsequently to
27 the survey of which "Exhibit A" is a plat.

The plaintiff then offered in evidence the U. S.
patent to Andrew McNamee, for the lots num-
bered 6 and 7, section 31, in Township 12 south,
range 2 east, in the district of land subject to
sale at San Francisco, California, comprising
 $62\frac{11}{100}$ acres, and dated November 10th, 1868.

There being no objection it was admitted in
evidence.

Plaintiff next offered in evidence the patent of

the Rancho San Cayetano, recorded in Book "A" 23 of Land Patents of the County of Monterey, on pages 74, 75, 76, 77, 78 and 79, together with the plat or diagram accompanying said patent, and being a part of the record thereof. Dated December 22d, 1864, and made to José de Jesus Vallejo.

There being no objection it was admitted in evidence. A copy of that part of the line in question, and of the field-notes thereof, is as follows :

Patent of the United States

29 To José De Jesus Vallejo, testamentary executor of the late Don Ignacio Vallejo, deceased, dated February 14th, 1865, to Rancho Bolsa de San Cayetano, bounded and described as follows:

Beginning at a point on the Pajaro river, recognized as the boundary line between this Rancho and the Rancho Vega del Rio del Pajaro; thence (variation 15° 45' east) along the line of the said Rancho Vega del Rio del Pajaro S. 12° 30', E. 17.20 chs.; thence S. 85° 15', W. 26.80 chs., S. 58° 30', W. 27.22 chs.; thence S. 81°, W. 26.75 chs.; thence N. 83° 45', W. 24.17 chs.; thence S. 57° 15', W. 27.19 chs., S. 34° 15', W. 53.70 chs.; thence S. 10° 30', W. 83.12 chs., to an oak tree 2 $\frac{1}{2}$ ft. in diameter, marked B S C 9, on the edge of an estero; the line meandering along the edge of said estero in a general southwesterly direction to a post marked B S C 10, and sec. 4, in mound station at intersection with the third standard S.R. 2, east 31.00 chains, east of corner, to sections 4 and 5; thence N. 67° west (at 214.26 chs inter-

seets line between ranges 1 and 2, T. 12, S. 3' 3.70
 31 chs., N. of corner to sec. 25, 30, 31, and 36, at 225
 chains descends into bottom land) 234.10, chs.
 to a post marked B S C H, at the end of a fence
 in the bank of the Pajaro River; thence meander-
 ing up said river, in a general northeasterly
 direction, to the place of beginning, containing
 8866.43 acres, and being designated upon the
 plats of the public surveys as lot No. 39, in T.
 12, S. R. 1 E., lot No. 40, in T. 12, S. R. 1 E.,
 and lot No. 40, in T. 12, S. R. 2 E, Mount Diablo
 meridian.

32 Recorded April 20th, A. D. 1865.
 Plaintiff next offered in evidence a certified
 copy of the survey of the southwestern boundary
 (as surveyed by the U. S. Surveyor-General) of
 the Ranch of San Cayetano, dated March 9th
 1869.

There being no objection, it was admitted in
 evidence.

See end of Transcript for map.

Plaintiff also offered in evidence the diagram,
 marked "Exhibit A," which is hereto annexed,
 and made part thereof.

33 See end of Transcript for map.

James E. McFarland,

A witness called on behalf of plaintiff, being
 duly sworn, testified :

I know the tract of land designated. These
 lots 6 and 7, section 31 Town. 12 south, range
 2 east, are located south of Smith's line, be-
 tween McCusker's fence and Smith's line. I

mean by Smith's line the line of the San Ca-
34 yetano Ranch. As I said before the land de-
scribed in this patent runs up to the line as run
by Smith. I don't know exactly what course
Smith's line runs. I was present when Smith
ran that line. The line which I refer to as
marked on the diagram in evidence in red is the
one as run by Smith, and the land in dispute
lies between the line marked in red and black.
The black line on the diagram is intended to
show Stratton's survey, and the red line on the
diagram is the line as run by Smith. There was
35 a fence on the black line, known as McCusker's
fence. I don't know exactly when the fence was
built; it was built before I came there.

(Witness describes on the diagram the land
described in the complaint as the tract of land
embraced in the patent to McNamee, offered in
evidence.)

Lots 5 and 6 includes the land lying be-
tween Stratton's and Smith's fence, and em-
bracing 19⁷³₁₀₀ acres. McCusker was in possession
of this land on the 23d of January, 1869. He
36 has been in possession since that time. He is
now in possession. McCusker rented it last year
for \$3 per acre. If I were going to rent the land
I would not pay more than \$2 per acre for it.
That is all I consider the rental value of the land
to be worth. The distance from Smith's line N. 67°
W. to McCusker's fence, I do not remember. The
width of it is something over 4 chains, I believe.
I know where the line N. 67° W., or the Smith
line, strikes the Pajaro river. I know where the

lower line, or Stratton's line, strikes the Pajaro.

37 The distance between these two points is six chains, I believe. I was present when Smith ran the line.

CROSS-EXAMINATION.

I was present when Smith made the survey to ascertain the section corners. That was when he made his first survey.

From the calls of the patent and Smith's survey, I know lots 6 and 7, in Township 12, south.

The calls of the patent are what it sets forth.

38 I know where lots 6 and 7 are from Smith's survey. I know, because Smith's line runs north where that patent calls for.

I know, because I am acquainted with the land and I was present when he ran the line.

How do you know what lots are designated in U. S. Surveyor-General's Office, as lots 6 and 7 of that Township? Answer. All I can judge from is Smith's survey.

Smith was the County Surveyor of this County. The only knowledge I had is what Smith told me.

39

I cannot describe the boundaries of the lots, except by Smith's survey. I suppose they run up to the grant line.

I have no knowledge or information on the subject except what Smith gave me.

McCusker was in possession on the 16th day of January, 1869.

Frisbie had the land rented then. He rented it.

I know that McCusker owned the land, because
40 Frisbie told me so.

My information on that subject is derived from Frisbie and others. McCusker was not himself occupying the land. I presumed McCusker to be in possession of it, because he owned the land, but Frisbie was in possession and cultivated it at the time of commencing this suit.

I did not follow Smith in his survey. He started from "B. S. C. 10." Mr. Smith used the instrument.

I did not use it. I only know from what he
41 told me as to the distance. I followed him over to the Pajaro river. The land is high table land there. We did not pass any streams or water courses—none. I walked the whole distance—there was one little slough where you could not walk. It was some ten or fifteen chains from the Pajaro river—there was no place, from the time you reached the slough to that point, where you could not walk. I crossed some road—the land on the County road was fenced, the road which crossed that line near the middle of it.

42 When we approached the Pajaro river, we did not go through the slough. Smith made an offset, and went around it, north of the course.

Between that and the river, the line passed over a point of land that ran down toward the low land; between this water and to the north of it the land rose to the level of the table land. I have been along the line of the Stratton survey, frequently, but not on any survey. I think Smith took the course of that line—he did not

chain it—that line is marked by a fence. There
43 is a continuous fence on that line, from its com-
mencement to the river, except there is a place,
of about one-quarter of a mile, where there is no
fence. It was through a portion of McCusker's
Government land. That is, it is fenceed on both
sides, but does not cross his enclosed field. This
fencee was on the line when I crossed it. I do
not know who put that fence there—there was a
house there. It was near the river, where
Stratton struck the river. It was not more than
12 yards from Stratton's line, and about 50 yards
from the river. And from the Shattuck house
44 to the fencee is about 12 or 15 yards. It looks to
be a house that might be there some years—there
were several other houses on the place. I don't
know exactly the distance from the river to
McCusker's first cross-fence. It is nearly half a
mile from where the fence on the Stratton line
strikes the cross-fence on McCusker's Govern-
ment land. That cross-fence runs a little south
of east, I believe. This cross-fence—pointing it
out on the diagram—runs north and south. It
may run west of south. I could not tell exactly.
45 Counsel for the plaintiff here withdrew his
consent to dismiss the suit as to Frisbie, it having
been made under a misapprehension.

Counsel for defendant objected to the with-
drawal. The Court overruled the objection and
permitted it. Counsel for the defendants ex-
cepted.

RE-DIRECT EXAMINATION.

46

I don't remember whether Smith had the patent before him or not, at the time he made his survey.

Was he not called upon by yourself and others to locate the land of McNamee, described in this patent, with reference to that line?

Question objected to by defendants. Objection overruled, defendants excepted, and their exception was noted. Answer. Yes, sir. He was—I understand you, then, to say, that he did locate the land described in this patent. Did he or not do so?

47

Question objected to by defendants. Objection overruled, and defendants excepted, and their exception was noted.

Yes, he was requested to locate the lines of that patent in pursuance of that request. He found out the number of acres between the two lines, and ran that red line, and computed the number of acres lying between the red and black lines.

48

Edward McNamee,

A witness called on behalf of plaintiff, being duly sworn, testified:

I know the land described in the patent

(By the Court.) Give us your description of lots five and six; give us their boundaries, as you understand them.

Question objected to by defendants; objection overruled, and defendants excepted, and their exception was noted.

On the south side, is the line where Smith ran
 49 his line by the San Cayetano Ranch. The south
 line is the line between the land and McCusker's.
 On the east it is bounded by the Township line
 of Trimble. In January, 1869, McCusker had
 part of it, and my father had part of it. McCusker
 was in possession of the piece along the San Ca-
 yetano ranch, eighteen acres. I believe that is the
 land described in the complaint, the part of
 which he was in possession, bounded by a line
 running north 67° west, on the south running
 $68\frac{1}{2}^{\circ}$ west, and on the east by McCusker's to the
 fence. That was the land McCusker was in posse-
 sion of. He was in possession of that in 1869.
 50 No one else was in possession of it. He has been
 in possession of it since that time; he is in posses-
 sion of it now. He rented it for three dollars
 per acre last year. I consider the rental value o
 it now one dollar and a half an acre. Three dol-
 lars is more than I would consent to pay for it.

CROSS-EXAMINATION.

I know which are lots five and six of section
 51 thirty-one, because I was with Smith when he
 surveyed the land. I have no knowledge on the
 subject except what Smith and all of them said.
 My father and all of 'em said that those were
 the lots. I don't know how many lots there are
 in section thirty-one. Lots one, two, three and
 four are down next the river. I am not certain.
 I mean the Pajaio River. I don't know what
 sections they were in. In section thirty-one, ac-
 cording to the United States survey, there ought

to be four lots. Question. How came two of
52 them to be five and six? I expect two of them
are corners. I don't think I can describe five and
six and tell their boundaries, by actual objects. I
know their location from what I heard them say
about them. I don't know whether I have or not
seen a map of the United States survey of that
Township. I was never in the United States Surveyor-General's Office. I have not seen a Township
map of that Township. Smith is a county
officer. At the time of the commencement of the
suit McCusker claimed the land. I think he was
cultivating and carrying it on himself. I saw
53 lots of men there at work. I did not see him at
work, but I saw him around there.

Munro Shattuck,

A witness called on behalf of plaintiff, being
duly sworn, testified:

I lived at Watsonville most of the time during
the years 1857, 1858 and 1859. I was present
part of the time when Terrell and his deputy, Cox,
54 made the survey of the boundary line of the San
Cayetano Ranch. I did not follow them through.
I know where they established the southern
boundary line of that ranch on the river. It was
near the same point where it was afterwards es-
tablished by the County Surveyor, Smith. Ter-
rell marked the post where we stood. We stood
on the bank of the river. I lived there; I went
there in the fall of 1857, and lived there
until 1867, or 1868. Looking at the map

there was a fence which ran up and down the
55 Pajaro river, at a short distance above the Ter-
rell line, to a point on the river where the line
was established by Stratton. At that point
there was a fence; at the time that Stratton ran
the line there was an old fence that ran from the
house to the river. That fence does not stand
there now; it was not a regular fence all the way.
I do not recollect how it was immediately at
that line, but above that I know that I had
some fencing to prevent stock from going on to
the bank. In some places they could get through
and in some places not, but whether it extended
56 from that line I could not state positively. The
course of the line established by Stratton ran just
below my house to the river south. The fence
of which I speak ran over to my house, which
is situated below the Stratton line, between two
and three rods from the Stratton line, and from
forty to sixty yards from the river. That was
my yard fence; it was at right angles with the
river, the old fence below my house. There was
no fence running up and down the river below
the Stratton line. From the Terrell line down
57 the river there was no fence. Terrell established
his line at the upper corner of the garden I had,
that was fence 1, the fence running up and down
the river. He established that line at the upper
end of that fence that ran up and down the river,
or nearly so, I think. It ran a short distance, but
the exact point of that fence I cannot state, as it
was partly fenced by the bank. That was at or
near the place where Smith's line strikes the river.
It is about, I think, six chains from the stake

where Terrell established his line down to where
58 Stratton's subsequently was at the time his stake
was established. I understood that Terrell and
his men were making an official survey of the
ranch when he established his stake.

BEING CROSS-EXAMINED

By Mr. Brooks, he testified :

The fence that led from my house to the river
was a regular fence ; from that along the river
there was a fence built of pickets. My memory is
that there was a fence all the way, in some places
of pickets and in others of slats—there was a
59 continuous fence from the Stratton fence to a
point above the Terrell line. I don't think there
was any space between where there was no fence
at all. Possibly there might have been where the
bank of the river formed a fence. My memory
is, that I had it fenced all the way—my memory is,
that there was some kind of a fence all the way.
It was between two and three chains, going from
the river on the Smith line, from the river bank,
until you began to rise on the bank, then it rose
something like twenty feet ; you don't continue
60 on the level, you pass over an abrupt point, and
then you go over another hollow towards a lagoon.
The map at the place marked 26, in red ink,
fairly represents the configuration of the country,
as far as I can see. There is a point as shown
running down to the river after you pass over
that—on the line you fall into such a depression
of ground as shown on the map. It is some
distance when you pass over it before you rise
again, more than 4 chains before you rise to the

table land. Probably a little higher—then over
61 where the line crosses over the point. After
that, you continue on the table land till you strike
the Slough, thence crossing, on its course, the road
between Watsonville and Monterey. The Strat-
ton line passes directly over bottom land for a
few rods, and then ascends on the table land.
The distance on the bottom is about 10 rods,
more or less. It runs between two and three
rods from my house. The line was right down
by the old fence, running from my house to the
river. I was present when Stratton set that
corner stake. McCusker was present also. I
62 did not, when Stratton established his corner
stake, admit that it was within 2 or 3 feet of the
corner established there at the regular survey
made by Terrell, but in the preliminary survey
there had been a stake placed there, before the
survey of the ranch was ordered. That was
made by a surveyor employed by the owners of
the ranch. It was so made to establish the cor-
ners when they made the application for their
grant. There was an original post put there by
this preliminary survey. I had a dispute with
63 him about his not having got the right position.
I did not state that I would have to own up or
back down, or that I would admit that he was
within 2 or 3 feet of the corner post. I will
tell you the conversation we had. What I said
with regard to the two or three feet was this, the
line of this old fence, that ran from my house to
the river, in the preliminary survey, went to my
posts that stood down on the bank of the river.

He would not hear anything said with regard to
64 the Terrell line, but proceeded to mark the stake
on the bank, that being on the line of this
fence, which run at right angles with the river ;
their line running at an acute angle or triangle
made his line some two or three feet out of the
way. I told him that even if the corners had
been as he said, that still he was robbing me of
two or three feet of land. I put up that fence
on the Stratton line, immediately after Stratton
made his survey. I have forgotton the year ;
I suppose it was after the decree of partition. I
think it was later than in the fall of 1864. I put
65 up the fence immediately after the survey was
made. It was intended for a boundary fence.
It was mostly of posts and slats. I don't know
whether it was a lawful fence, but it answered
the purpose of fencing out stock. (To the
Court)—it was about five feet high. I culti-
vated land protected by that fence. It protected
stock. To make this fence I took down a por-
tion of the fence that ran from my house to the
river. There may be some posts remaining of
that fence where it strikes the river, forming part
66 of the present division fence. I don't remember
whether there are more than that at that point.
It is not on the same place where the old fence
was ; it runs in a different direction, and the
other fence runs at right angles ; it does not
strike the river at the same point the old fence
did, because they got 5 or 6 feet more this way.
There may be posts there next to the river. I
have forgotten about it.

RE-DIRECT EXAMINATION.

67 Did Terrell point out that as the corner where he put his post?

Question objected to by defendants; objection overruled, and defendants excepted and their exception was noted.

At the time that Terrell established the corner, I did not see him do it. I went to town the morning before they left the ground, and on my return they pointed out to me where they had established it. I think it was Terrell who pointed it out; it was the surveying party. Terrell's stake remained there till 1862, the year the river was very high, when the water washed stake and fence away. I think it was in 1862 that it was carried away. I saw the stake every few days from the time it was established until it was washed away. There was no fence on the Pajaro river, running up and down the river, below the line subsequently established by Stratton at the time Terrell made the survey. There was none below Stratton's corner.

RE-CROSS EXAMINATION.

69

I built the fence between the two lines at different times. I rebuilt it after it had been washed away in the winter of 1862—1863. There was no fence there when I purchased the property. I bought it from Kingsley King, in 1856 or 1857, I think. I may be mistaken, but I think there was a fence running from my house to the river. I think there was a fence near

there. If there was a fence I rebuilt it. I think
70 there was some kind of a fence there, near the
river, where I built the fence, I built mine
of a different character. I think there was
no fence up and down the river. I went
there along about the first of January, 1856 or
1857. I guess it was 1856. I cannot tell how
long it was after I went there when I put the
fence there. I depended at first upon the fence
that King built on the river, to prevent stock
from getting in. That was a little above the
Stratton line. I think the fence was running
into the river a little above the house; the other
71 fence ran at right angles; the fence ran right
down to the river. I cannot tell in what year
I fenced it. That was never a very substantial
fence. I put it there at different times. I don't
know exactly the period I first put a fence there.
It was probably in 1858. I occupied a piece of
land that was taken in by the ranch a quarter
of a mile above the fence. I occupied on both
sides of the line. The object of the fence built
along the bank of the river by King. It ap-
peared to me that King had a lot there that he
72 used for pasture. I used that place as a garden,
and my object was—I fenced it to keep stock
out of the garden. I think that there was not
a fence there in 1858. I did not remove it.
In 1858 I built a fence along the river, and en-
closed it with a fence that runs across a little bot-
tom, and strikes the river at a point below Terrell's
line; it runs to a little bush in the bottom to
a point through that bushy land. There was a

timber fence that connected with the river still
73 above the Stratton line. I had an enclosure up
to the time that the survey was made there by
Terrell I think, in 1858, or 1859. I had a piece
of land enclosed by four lines of fence, with the
exception of a very little at the upper end where
it was fenced by the bank. The distance from
the Terrell line to the upper end of that fence
was nearly a chain, from three to four rods. There
was a fence most of the way from the point where
the fence struck the river, down along the bank
of the Pajaro river. As I have stated, I depend-
ed on the bank for the fence, as there was no
74 chance for stock to go through there. Some of
the way there might not have been any fence,
and in some places one slat or so. That fence
extended something like seven chains down the
bank, from where the upper fence struck the
river in the year 1858. It extended the whole
distance down to the Stratton line. I cannot
tell how far it extended before there was a break
in it. I think there was two or three rods where
there was no fence at all. It might have been
four. I think there was no fence above this old
75 fence. I suppose this fence corner might be
something near three or four rods above the Ter-
rell line and Smith line. I never thought to view
it so as to determine the distance, but three or
four rods above the Terrell and Smith line. The
purpose of the fence in 1858 and 1859 was to
enclose a small piece of land which I used as a
garden. Where Terrell established his corner
was but a few feet from the corner of the end of

the fence. There was a small fence at the time
 76 that he made his survey. It ran down the river.

Peter McNamee,

A witness on behalf of plaintiff, being duly sworn, testified:

My father and I live on lots 6 and 7 of section 31, Township 1, Range 2. I know it. I got Smith the County Surveyor to survey it, to see how much there was in it, between the Ranch and McCusker's end of the line.

Counsel for the defendants moved to strike out the above answer, on the ground that the information of witness was hearsay.
 77

The Court overruled the objection and defendant excepted, and his exception was noted.

I know the land described in the complaint. It is a part of the land described in the patent, and surveyed by Smith. I do know who is in possession of the land in controversy. It is McCusker. I know the land from the description of the fence, and the boundaries given.

BEING CROSS-EXAMINED

78 By Mr. Brooks, he testified:

I know lots 5 and 6, because Smith ran out the line and located the land. I know he did it because my father got him to locate it and run out the line. He drew a plat of it which I suppose is here. This is the map. I know lots 5 and 6, because Smith made the survey of them at the request of my father, and made a plat of them, and I find on the map something about lots 6 and 7.

I know the land described in the complaint as
 79 lots six and seven of section 31, because the deeds
 from the Government show that. I know what
 this suit is about. It is about this land my father
 lives on now. I know that the land is part of
 lots 6 and 7, because it was run out and located
 by Smith. Smith ran the courses to see how much
 land there was on it and how much there was on
 the outside. That was what Smith did, to run
 the lower line of the San Cayetano Ranch, to
 see how much land there was between that and
 the Stratton line. He ran the courses to see
 how much there was between the lines.

89

Ebenezer Niediver,

A witness on behalf of plaintiff, being duly
 sworn, testified:

I have been engaged in surveying and farming.
 Some 14 years I have been engaged in surveying.
 I know something about the San Cayetano Ranch.
 I do not distinctly know where the southern
 boundary of the ranch, known as Terrell line,
 81 touches the Pajaro river. I know nothing
 about where the survey of Smith touches the river.
 but the course which was pointed out to me as
 the place "C and L."

I know where there is a post marked "B. S. C,
 11," which was pointed out to me as the post es-
 tablished by Stratton. The post is situated from
 Shattuck's house, north, I should think, some
 two or three chains. I chained the bottom of

that Stratton line, from the river to the table-
 82 land. The width of that bottom from the river
 from the Stratton corner to the table-land, is 5
 chains and 80 links. My object in chaining it
 was to find out the width of the bottom. 9
 chains and ten links was the width of it. That
 point is above the Stratton line—3 chains and
 40 links above the Stratton line. I know nothing
 more about the Smith line than as it was
 pointed out to me.

BEING CROSS-EXAMINED

83 By Mr. Brooks:

I only chained to the edge of the river, but
 I think it would be $6\frac{1}{4}$ or $6\frac{1}{2}$ chains from the
 table-land to the river, on the Stratton line. We
 did not chain it only to the edge of the bottom.
 From where I commenced to descend, from the
 table land to the river, it would not be eleven
 chains; it would be something over 6 chains from
 the table land to the river. Yes, from the bank,
 at the edge of the bottom land. That is the
 best of my recollection, but I did not chain it.

I was employed to chain the river to where the
 84 land commences to rise. I did not chain the land
 from the point from where it commences to de-
 scend.

Kingsley King,

A witness on behalf of plaintiff, being duly
 sworn, testified:

I know the Shattuck house spoken of here.
 85 The other day I saw the course established there by Stratton in 1862, near the house. I formerly lived there. I took the place up in 1852, along in the fall, and I lived there till the first day of November, 1857. There was no fence below the Stratton stake on the river. I did not see any there since there was none below that on the river.

BEING CROSS-EXAMINED,

By Mr. Brooks. I have been on it twice since 1857. I built a house there. It stands there now. I built a fence from the house to the river, about 35 yards from the present line of fence. I think there is a portion of it there now, towards the hollow. The fence does not stand in the same place, but I should judge, from the appearance of the timber, that it is the same fence. It was a rail and post fence—it was a substantial fence. I think that same timber is there now. I did not build any fence along the river. I did not see the fence from the time I left it, in November, '67, for six months afterwards. I was next on the property in 1859. It was along in the spring sometime. There looked to be about the same fencing as when I left. I did not notice any more. I think there was more at the time, between me and McCusker's house. I did not notice any fence on the river bank. There was a fence that run along upon the Bluff. In the summer of 1859, when I first saw it, I had a fence that was attached to it. (Witness pointed

out on the map where these fences were.) This
 88 fence was about forty yards from the river. It ran up on the Bluff 200 yards. I saw where the Smith line was said to terminate on the river. I saw a stake there to make the point. I did not notice any fence at that point in 1858 or 1859. At that point there was none there, when I sold it. The fence I speak of, which ran along the Bluff, was about half way below that. It was about 35 yards from the lower line up to where I had my fence. The map represents the shape of the country pretty well, where the line strikes the Pajaro river.

89

RE-DIRECT EXAMINATION.

When I lived there, there was no fence along the bank of the river up to the Stratton line—there was another house there besides the Shattuck house above it. I think it was 75 yards above Shattuck's house. Shattuck succeeded me in my possession. I don't know if he did take possession soon after. I then left for the lower country, and he was there when I
 90 came back. It stands in the same position as when I left it.

The plaintiff here rested.

Counsel for defendants moved for a nonsuit, on the ground that plaintiff had not shown any title to the land described in his complaint.

The Court denied the motion to which defendant, by his counsel, duly excepted.

The defendant then, to maintain the issues
91 joined on his part, called as a witness:

Daniel McCusker,

Who, being duly sworn, testified as follows:
I know the land in controversy in this suit. I
have known that land since 1853. I know the
point on the river where the Smith and Stratton
lines terminate. I have known that land for some
time. I was not there when the survey was made
by Terrell. There was only one fence there in the
summer of 1858. It was right on the Stratton
line. That fence did run down to the water, in-
92 to the water. The make of the land, at that point,
was a kind of mud flat, from the bank on the
river. The make of the shore was a kind of
bottom land. The length of the bottom land,
from the river to the table-land, is 9 or 10 chains
on the line of the Stratton fence. On the Smith
line, it is probably 8 rods till you strike this bluff;
over the bluff till you come to this slough, it is
probably four or five chains. There is a little
bottom land, between that high point and the
river. That map annexed to the patent represents
93 the topography of the country at the river. I
was present when Stratton ran that line. I was
present when he ran that line on the Pajaro
river. I was present at the conversation between
Stratton and Shattuck, and there must have been
eight or ten others present. What took place
was this: I didn't own the land at the time. We
were quarrelling about the line. After some con-
versation, Shattuck finally said to Stratton, that

he (Shattuck) must "give it up,"—that he (Stratton) was within two or three feet of the stake which Terrell put down. Stratton's stake or corner was right where the fence was, a little piece, probably two or three feet, from the posts, right up against the slats. It was a kind of a slat-fence. It was kind of old. I would suppose it was there some 13 or 14 years. It had been there as long as I have known the land. There was not any fence running along the bank from that point up. Shattuck came there in November, and that stake was put there in June following. There was no fence there terminating at the river, above the Stratton line. I think there was no fence there but this one. Stratton marked the line after it was established by him. He put stakes down in every place, so as to put a fence on. After the line was established, the fence was put there inside of a year. Shattuck put up half, and I put up some. Shattuck paid half. I put up some, and McNamee put up some. Shattuck paid his half, and the others paid half. I think that map, (Smith's,) does not give the proper position of the fences that cross that line. My west fence is about half a mile from the Pajaro river. The fence runs between me and McNamee, on the ranch line,—that is, on the regular section line. The fence nearest the river takes the course, I think, about east and west. That fence is no regular line between Shattuck and I. I should think it is east and west. The fence which was put up by me was a substantial fence and a good one; the other fence would turn stock. It was so cal-

culated, according to the Stratton survey, to be a
 97 permanent boundary; that line was acquiesced,
 until this township was laid out, about three or
 four years ago. I think about three years ago.
 The deed from me to Shattuck was a deed of ac-
 commodation. I lived in another township, and
 we both had lands on each side of the township
 line. He entered the land for me adjoining his in
 his township, and I entered land for him adjoin-
 ing mine in my township. Finally, we agreed to
 deed this land back again. We both made loca-
 tions of school lots, and we both quit-claimed to
 each other.

98

Defendants then offered and read in evidence a
 deed from Shattuck to McCusker, dated March
 3d, 1864, and recorded on the same day; page
 559, Book E., which deed is in substance as
 follows:

Munroe Shattuck to Daniel McCusker.

Deed dated March 3d, 1864,

Consideration, \$1.

Grants, bargains, sells, remises, conveys and
 99 quit-claims all the right, title and interest of
 party of the first part to the following described
 land, located by the party of the first part under
 the law relative to the sale of the five hundred
 thousand acres of land, donated to the State for
 school purposes, and the seventy-two sections
 donated to the State for the use of a seminary of
 learning. Approved April 23, 1858, and of the
 Acts amendatory thereof. Approved Feb. 18,

1859 and April 22, 1861. Located by Leander
 100 Ransom, State Locating Agent, on the 14th day
 of March, 1863, and approved by the State Sur-
 veyor-General of California, on the 27th day
 of June, 1863, and is the N. E. $\frac{1}{4}$ of S. E. $\frac{1}{4}$ sec.
 Sed. of sec. 36, and that part of the S. E. $\frac{1}{4}$ of
 N. E. $\frac{1}{4}$ Sed. of sec. 36, lying east of the present
 division fence of party of first part and party of
 the second part, and west of the east boundary
 of sec. 36, and north of the $\frac{1}{4}$ section line running
 west through the middle of sec. 36, township 12
 south, range 1 east, Mount Diablo meridian, being
 101 about fifty-nine acres of land in both of the above
 described tracts.

Acknowledged March 4, 1864.

Recorded March 9, 1864.

To the introduction of this deed as evidence,
 plaintiff's attorney objected. Court overruled
 the objection, and plaintiff excepted.

BEING CROSS-EXAMINED

By Mr. Craig, he testified. I think that fence, the
 fence specified in the deed, runs about east. I could
 not tell correctly the course it takes. It was there
 102 for 15 or 16 years. That is not the fence run-
 ning on the Stratton line, but it goes to that
 line. It joins to the fence. The fence between,
 is not the ranch fence—it runs up to one side. I
 was opposed to the Stratton line. It was estab-
 lished about four years ago last winter. At that
 time I objected to it, because we understood that
 they had too much in the ranch. I did charge
 Stratton with running too far down. The Ter-

103 rell stake was washed out in 1863 or 1864. I saw it there, and I was there when it was planted at the Stratton corner. That is the only corner I know. I never saw any stake at the upper end, That is the Terrell line, and the only line I know. I saw the Terrell stake in 1863. I saw it when I brought over produce to ship; the boat was tied to that fence. I never saw the Terrell stake up to the Smith line; they say that Smith set it there. Shattuck built that fence up the river from Stratton line, as now surveyed, up to the Smith line I think it was after 1860. I think so. I cannot tell you whether I am as positive of that fact as 104 I am of other facts to which I testified. I told you that stake was put there in 1860 or 1861, I think. I saw a stake there, marked. It was the only stake I saw there.

RE-DIRECT EXAMINATION.

There were three surveys of the ranch. Vallejo had a survey made of it, preliminarily, in 1855 or 1856. I knew this land at that time. The stake that I speak of is not the Terrell stake that stood there at that time. The stake that 105 stood there at the end of the fence was a private survey. It was a small stake, separate from the fence, driven in the ground on purpose. It had some marks on it. It was right on the bank of the river. The banks were low at that place, about three or four feet high. I suppose, in floods, the tides go up to it—to the stake set by Stratton. I think the water has been up to it at high water.

Defendant next offered and read in evidence
106 the deposition of G. H. Thompson of San Fran-
cisco, which were in the words and figures follow-
ing:

[TITLE OF COURT AND CAUSE.]

It is hereby mutually stipulated and agreed by
and between the respective parties to the above-
entitled action, that the testimony of G. H.
Thompson be taken, on behalf of said defendants,
before John A. Barham, Esq., a Notary Public
in and for the County of Santa Cruz, State of
107 California, at his office in Watsonville, in said
County, at the hour of 3 o'clock, P. M., on this 9th
day of March, 1870. And that when said deposi-
tion is so taken before said notary, in writing,
upon interrogations by the respective parties and
in their presence, the same may be read in evi-
dence on the trial of said cause, subject to no
other or further objection or exception whatever
than its relevancy, competency or materiality, it
being the true intent and meaning hereof to
waive all technical objections and exceptions
108 hereto, such as want of time and place, and no-
tice of taking; and to agree that the same shall
be subject to the objections above stated, and no
others.

CRAIG & BARHAM,
Plaintiff's Attorneys.

JULIUS LEE,
Attorney for Defendant.

109 [TITLE OF COURT AND CAUSE.]

Be it remembered: That pursuant to the stipulation hereto annexed and marked "A," and on the 9th day of March, A. D. 1870, at my office in the town of Watsonville, County of Santa Cruz, and State of California, before me, John A. Barham, a Notary Public in and for the said County of Santa Cruz, duly appointed, commissioned and sworn, with due and legal authority to administer oaths, &c., &c., personally appeared G. H. Thompson, a witness produced on behalf of the defendants in

110 the above-entitled action, now pending in the said Court, who, being by me first duly sworn, was then and there examined and interrogated by Julius Lee, Esq., of counsel for said defendants, and by A. Craig, Esq., of counsel for said plaintiff, and testified as follows:

Question. What is your name, age and place of residence?

Answer. G. H. Thompson, age thirty-four years, place of residence San Francisco.

Q. What is your business or occupation, and 111 how long have you been engaged in it?

A. I am a surveyor; been engaged in that business for nearly thirteen years.

Q. Do you know the Bolsa de San Cayetano Rancho, in Monterey County, and if so, how long have you known it, and under what circumstances did you become acquainted with it?

A. I have known the rancho Bolsa de San Cayetano since the spring of A. D. 1858. I first

112 became acquainted with it in assisting the making the official survey thereof.

Q. At what time was this survey made in which you assisted, and who was the Surveyor making the survey?

A. I think the survey was made in June, A. D. 1858, and James E. Terrell was the United States Deputy Surveyor. Mr. Terrell was not himself a practical surveyor, but he employed Mr. Clement Cox, a practical surveyor, to run the instrument under his (Terrell's) direction.

Q. State all who were present at the time of making the survey of said ranchos?

113 A. James E. Terrell, Clement Cox, a man named Z. Moore, a man named Perkins, myself and some others, whom I don't recollect.

Q. Is your recollection distinct as to the manner in which the southwesterly boundary line of that rancho must run at that time?

A. It is quite distinct.

Q. Have you since been upon the premises to inspect them?

A. I have. I was there to day.

Q. Please describe how that southwesterly 114 boundary line was run, and where the corner on the bank of the Pajaro river was established at that time by that survey?

A. It was run through from the estero in several courses, and afterwards a straight course was calculated through, from the corner on the estero to the corner on the Pajaro river, which was in a small bottom, at the end of a fence.

115 The corner was established by a marked post immediately on the bank of the river.

Q. What natural, or other objects, did you pass, in running that line, to establish that corner, and what distance from them did you pass?

A. About thirty rods, before reaching the terminus of the line on the bank of the river, are descended from the table-land into the river bottom, and passed about three or four rods to the east of a small house about half way between the table-land and the river.

116 Q. When you examined the premises to-day, as you have stated, did you recognize the place where you established that corner on the bank of the river in making that survey?

A. I did.

Q. Describe now where that place is, with reference to any objects at present there.

A. It is about at the same place where there is now the corner of a fence, and a marked red-wood post, and the same house before referred to is still standing there.

Q. How is the red-wood post you referred to marked?

117 A. I noticed some marks on it, but did not examine particularly what they were.

Q. Is the corner of the fence you speak of the same fence that was there when you made the survey?

A. I do not know that it is the same fence, but think that it is.

Q. Do you know who placed the stake on the bank of the river which you saw to-day?

A. I do not.

118 Q. State whether or not there is a fence on the line from this stake to the other corner on the Estero that you spoke of?

A. I do not know whether there is a fence exactly on the line. There is a fence near about on a portion of the line.

Q. Following up the bank of the river from this stake, what is the character and topography of the country, and what objects, if any, did you observe there?

119 Objected to by plaintiff's counsel, upon the grounds that the same is incompetent; that it does not appear that the witness knows anything about the topography, or line running up the river.

A. There is a small bottom extending about twelve or fifteen chains; from thence the river has a precipitous bluff bank, and I noticed another redwood stake, with some letters marked on it, near the upper end of the small bottom.

Q. Do you remember what the letters were on this stake?

120 A. I do not, as I did not examine them particularly.

Q. What is the distance of this stake above the other stake, at the corner of the ranch you have mentioned?

Objected to by plaintiff, as incompetent.

A. I did not measure the distance, but should judge it to be about ten chains.

Q. Is this upper stake the corner of the ranch,

as established by the survey you speak of as
121 made in A. D. 1858?

A. It is not.

Q. Is the lower stake you speak of, at or near
the corner established by that survey?

A. I think it is about the same place.

Q. Do you know the course of this southwesterly
boundary line, from the corner you speak
of on the estero or slough?

A. I do not.

Q. Do you know how that line came to be
run in the corner it was?

A. I do not now recollect.

122 Q. Do you recollect whether that line was
established by actual survey or calculation?

A. It was established by calculation from an
actual survey.

Q. Will you explain a little more fully how
the actual survey was made from which the cal-
culation was had?

A. By chaining a line from the estero across
to the river, in several courses from which the
straight line between the two points was calcu-
lated.

123 Q. Had the two points you have named, to
wit: the point on the estero and the point on the
Pajaro river, been established before this south-
westerly line was run or calculated.

A. The two points were established before
making the calculation.

Q. How near does this line run to the small
house you speak of?

A. I think it will run or pass about three or
124 four rods to the east of the small house.

CROSS-EXAMINATION.

Q. In what particular capacity was you acting in 1858, the time that survey was made, as a surveyor, or chain carrier, or employee of the Deputy-Surveyor?

A. I was employed and acting as chain carrier.

Q. Have you been on the premises at any time since 1858 up to and until to-day?

125 A. I have not, excepting merely to pass along the road through the ranch.

Q. About how far is the road you pass from the river at this point?

A. About two and a half or three miles.

Q. Is the topography of the country such that you can see the point on the river and house you refer to, from the road?

A. I think not; I think you can't see them.

Q. Then you have not seen this point on the river about which you swear, for twelve years?

A. I have not seen it since the time of making the survey, in 1858.

Q. Is not the end of the fence to which you have referred in your examination in chief as being the lower stake and fence, the north end of the fence which you speak of as running along as near the line, and being the division line of McCusker's premises?

A. It is the north end of the fence to which I referred as running along or near the line; but

as to its being a division fence of McCusker I
127 know nothing about.

Q. Was this line-fence there at the time you carried the chain in 1858?

A. I do not recollect of any fence excepting in the river bottom.

Q. About how long was that fence in the river bottom?

A. I think it was about thirty rods.

Q. Was you there as chain carrier at the running of the line up the Pajaro river, or northern boundary of the rancho?

128 A. I was present and carried the chain in running the line along the Pajaro river.

Q. When was that?

A. At the time the survey was made in 1858.

Q. Where did they commence to run that line?

A. In the Pajaro river, at the northeast corner of the ranch.

Q. Was it not run from the northwest corner of the ranch at that time—from a point on the Pajaro river, easterly?

129 A. I think the two first courses from the northwest corner of the ranch were run up the lines.

Q. Your estimate of distance of rods and chains from the house and from where the line descends into low lands from the terminus of the lines there is not made from any survey made by you, but simply from your observation and recollection of the lay of the country in 1858?

A. Only from my observation and recollection.

Q. About how many rods is it from the upper
130 stake on the river you spoke of, to the precipitous
or bluff bank up the river?

A. The ascent of the bank commences at
about eight or ten rods; it is perhaps twenty-
five rods to the top of the bank up the river or
easterly.

Q. On a line commencing at the upper stake
and running through on a straight line to the
southeast corner of the ranch on the estero, about
how many chains is it from the upper stake to
where the line would ascend into table-land?

131 A. About two chains.

Q. Commencing at the *lower* stake on the
river and running to the southeast corner of the
ranch, how far is it to where it ascends the table-
lands?

A. About seven or eight chains.

Q. Did you notice that, particularly, to-day?

A. I did.

Q. At the time the calculated line you say
was run from the southeast corner of the ranch
to the river, was there any stations or monu-
ments erected?

132 A. There were no monuments erected of any
kind, that I can recollect of, excepting at the be-
ginning and terminus of the line.

Q. Do you know whether there were any sta-
tions or section corners along that line, by which
the line was established?

A. None, excepting at the south east corner
on the estero, which is connected with the section

corner, which southeast corner on estero is near
133 a quarter section corner on the standard line.

Q. Where the lower stake, about which you speak, is situated, has any of the Pajaro river bank washed away since you were there in 1858?

A. From appearances, a very little, if any, of the bank has been washed away.

Q. What was the course of that fence which you speak of having been there in 1858?

A. I do not know the exact course.

Q. On a line running through, from the lower stake, was the bottom a level bottom in 1858?

134 A. In running from the lower stake on the river, in the direction of the corner on the estero, the bottom is level for seven or eight chains, to where the line ascends the table-land.

Q. Was there any brush on that line in that bottom in 1858?

A. I think there was some willows.

Q. On a line from the corner of the estero to the upper stake, does not the line descend into low or marshy lands, ten or twelve chains, before reaching the bank of the river?

135 A. It crosses a low narrow place, extending from the bottom lands up into the table-lands.

Q. After crossing that narrow place, over what kind of land would it run from there to the river?

A. Over high point of table-land.

Q. About what is the altitude of that table-land immediately where the line would cross above the bottom land?

A. I should think it was from twenty to thirty feet.

Q. Do you know the course that a line run
136 from the point on the estero to either point on
the Pajaro river?

A. I do not.

Q. Who, if any one, directed your attention
to what you have termed the upper stake in your
examination?

A. Mr. McCusker.

Q. Do you not know that the so-called lower
stake was placed where it now is by one Strat-
ton, after this rancho was patented?

A. I don't know when nor by whom it was
put there.

137 Q. Is there any other fence at or near the
Pajaro river, where the said lower stake is situ-
ated, than that which runs along or near the line
of which you spoke in your examination in chief?

A. There is a picket fence, or some pickets,
along the bank of the river.

Q. Was there any person living in the house
you speak of, at the time you speak of, in 1858?

A. I was not in the house at that time, though
I think it was inhabited.

Q. Are you sure that that house still stands
138 where it did in 1858?

A. I am quite certain that the house now
standing there is the same house, and stands in
the same place where it did in 1858.

Q. If the north line of the San Cayetano
Rancho was run, by commencing at the north-
east corner of the ranch, down to the northwest
corner of the ranch, and the courses and distances
along the meandering of the river taken, could

those courses and distances be correctly given by
 139 commencing at the northwest corner, and running thence to the northeast corner, without a survey of the line from the northwest corner to the northeast?

A. Certainly, just as correctly.

Q. Would that then not be what you term a calculated line?

A. It would not be, as it requires no calculation whatever; the courses are nearly reversed.

G. HOWARD THOMPSON.

140

STATE OF CALIFORNIA, } ss.
 County of Santa Cruz, } ss.

I, John A. Barham, a Notary Public in and for said County of Santa Cruz, do hereby certify that the witness in the foregoing deposition named, was by me duly sworn to testify the truth, the whole truth and nothing but the truth. That said deposition was taken at the time and place mentioned in the annexed stipulation, marked "A." to wit: At my office, in said town of Watsonville, County of Santa Cruz, in the State of California, and on the 9th day of March, A. D. 1870, between the hours of 3 p. m. and 9 p. m. of that day; that said deposition was reduced to writing by me, and, when completed, was by me carefully read to said witness, and being by him corrected, was by him subscribed in my presence.

In witness whereof, I have hereunto subscribed
142 my name and affixed my seal of office, this 10th
day of March, A. D. 1870.

JOHN A. BARHAM,
Notary Public.

(Endorsed) Filed April 4, 1870.

W. M. K. PARKER,
Clerk.

Defendant also read in evidence the deposition of

143 **James T. Stratton,**
which were in the words and figures following :

I am the surveyor who was appointed as one of the commissioners in the decree of partition in the case of Atherton *vs.* Fortule in this Court. I am a practical surveyor, and have been for the last twenty years in this State, and three years before that. For nearly ten years past I have been United States Deputy Surveyor for California. I am familiar, of course, with the practices of the Surveyor-General's Office. I made a survey of the exterior lines of 144 the Rancho Bolsa de San Cayetano in making the partition above referred to. I had at that time a plat of the final survey of that rancho, made under instructions of the United States Surveyor-General for California, and a copy of which is annexed to the "patent" of said rancho. I ran over the courses and distances called for by that plat at that time, with the plat before me, and re-established the courses of the rancho, in

accordance with that plat. I determined the 145 points of beginning "at a point on the Pajaro river recognized as the dividing line between this rancho and the rancho Vega del Rio del Pajaro," because it was undisputed and was fenced at that point. The witness post, on the southerly bank of the river, the crossing of the road and the oak tree at which the first course terminates also fixed the points of beginning beyond any question.

In retracing the southerly easterly boundary, I found that the courses were evidently calculated courses, and varied somewhat, but I found the oak trees terminating the 2d, 3d, 4th, 5th, 6th, 146 7th and 8th courses marked as on the plat. They varied in courses and distance both. At the end of the 8th course, I struck the bank of the slough or estero at Station No 9; from that point I retraced the courses and distances on the plat, and established each of the stations to the intersection of the 3d standard. These courses last spoken of, like the former, I found quite incorrect. Many of those lines are calculated lines from meanderings, and I found it impossible to locate them on the ground, except by 147 reference to the natural objects they refer to. I re-established the post "B. S. C. 10," and "sec. 4," by retracing the 3d standard line south, 31 chains east of the corner, to sections 4 and 5, as described in the patent. The standard line is fixed beyond question, as also the corner station 23, which is the intersection of that line with the west bank of the slough. I retraced all the courses, after arriving at that point on the

Pajaro river, by returning to the place of beginning, and retracing each course down to station 25. I found them unusually correct. There was not an error among them, and if the courses and distances were followed as given in the field-notes, they would fit the river exactly. Then, from station marked B. S. C. 10, I ran the closing line, along the southwest boundary of the rancho, to station 25, on the bank of the Pajaro river. I found the actual course and distance differed quite materially with that given in the patent. The course or distance given in the patent for that line, would bring me six or eight chains north, or above station twenty-five, which would be on a high bluff bank of the Pajaro river, instead of in a little valley, or bottom land, as described in the patent.

This closing line would not descend into bottom land and continue on about nine (9) chains to the river, but crosses a small cañada, and rises again on high land, and so continues, terminating on a high bank or bluff, on the bank of the river. At that time there was no fence terminating at that point, nor was there any evidence of any fence ever having terminated at that point. I then ran that line straight between stations B. S. C. 10, and the point where I had re-established B. S. C. 11, without regard to courses and distances, which I denominate the true line. In the calls of the patent there is no topography of the country given, on that closing line or course 24, except "leaving the slough and over table-land," and at "225 chains it descends into bottom

land," and at 224 chains and 10 links reaches
 151 the Pajaro river, at the end of the fence, which
 exactly agree with the calls of the patent.

Question. Can you tell from your knowledge of the practice of the Surveyor-General's Office, and of the Act of surveying, whether or not that the 24th course was a surveyed or calculated line, taking into consideration the fact that the other three sides of the rancho are fixed by natural objects, and in this connection explain the course and practice of the office, where the decree is for quantity?

Objection. Plaintiff objects as incompetent and
 152 immaterial, the conclusion of the witness not being evidence, nor is it capable of being used as such, and it is likewise irrelevant, and states a hypothesis not established in this cause, and seeks to evoke a conclusion thereupon.

Answer. There is usually a much greater quantity within the boundaries (exterior) of Spanish grants than is given by the decrees of confirmation. I can tell from my knowledge of the practice in the Surveyor-General's Office, and of the Act of Surveying, whether that course, 24, is a
 153 surveyed or calculated line. I say it is a calculated line, because the other three sides of the rancho are bounded by ranchos and a tide slough, fixed lines; and the fourth line, course No. 24, was run so as to include in the exterior boundaries the quantity confirmed, and hence, I say, was necessarily established by calculation. Course 24 was probably run at first, by Random, so as to calculate approximately the quantity, and

154 afterwards slightly changed, (by calculation, in which an error was made,) so as to include the *true* quantity; that the true actual line was *never* run actually upon the ground is evident; from the fact, that there is no topography given along the line, except near its terminations, and had it been actually run, all the intermediate topography would have been given, and there is topography, such as fences, and roads, &c. There are undoubtedly half a dozen objects to which topographical reference would have been made. Had that line been actually run, there would have been a post placed at the intersection of this line with the range line; the rules of the office require that. I do not know, however, that there is no post there, but I found none there, and none is referred to in the field-notes of the patent. End of answer.

155 There is a map made by me of this survey annexed to the report of the Commissioners in the partition referred to and on file in this Court in that case, the exterior boundaries of which exactly correspond with the exterior boundaries of the plat annexed to the patent. I marked the closing line, and afterwards a fence was built upon all that part of it, west of the road running to the ferry.

156 I marked station 25 by a good and substantial post, marked B. S. C. 11, at the end of a fence on the bank of the Pajoro river, in the bottom lands.

So much topography of the land as is on my said map laid down, is accurate and correct.

Course No. 24 passes a few rods, say six or eight, 157 northerly of the house of Mr. Shattuck, near the bank of the Pajaro river, who was present when I re-established the southwesterly corner of the rancho, who stated that I had located that corner within two or three feet of where the original post had stood, and which had been washed away by the river.

Objection. Plaintiff here objects to so much of the answer above, as refers to or gives any statement of Mr. Shattuck, as irrelevant and incompetent, and to all such answer following hereafter.

158 *Witness.* He at first contended that the true corner was on the bluff bank which I have referred to, about 6 or 8 chains north of the true corner; but after I explained to him how I had determined the true location of the corner by meandering down the river, he replied that he would have to give it up, and that I had located the corner within two or three feet of where it formerly stood.

Objection. Renewed, same as last, to all since last objection.

159

CROSS-EXAMINATION.

The course and distance of the closing line from B. S. C. 10, given in the patent, will not run to the point laid down for it in the patent, on the river.

I made my survey in 1864. All traces of an old fence or a stake, as called for, might have been obliterated between 1858 and 1864. The

old fence I found appeared to be 8 or 10 years
 160 old. I found it at the point where I located the terminus of the closing line. I believe it to be the fence referred to. The patent line does not call for brush 3 chains before reaching the river; it does call for bottom land, at 9 chains, or thereabouts, or rather says, it descends into bottom land. At the time I made my survey, I do not remember of the defendant or any other person pointing out a stake and an old fence at the termination of the closing line, as claimed by the plaintiffs, and the course of which is N. 67° west, as described in the patent; but some one did
 161 point a stake at that point, on the high bluff bank, but it had on it no marks to indicate that it was the one referred to in the patent.

There was but one house near my line, near the river, when I surveyed it. I know where the corner of secs. 25, 36, 34 and 36 should be, but its stake had been removed when I made my survey. With reference to that corner, my line, which I denominate the true line, would run, I suppose, a chain or two south of it. I never connected with it.

162 JAS. T. STRATTON.
 Sworn to and subscribed before me, this 1st day of April, 1870.

J. H. BLOOD,
 Notary Public.

D. McCusker being re-called, testified:

I showed Mr. Thompson, Stratton and Smith's stakes, the stake I showed him represented to be

the stake at the end of the line, that was the end
163 of the Stratton line. I pointed out all the stakes
around.

TESTIMONY IN REBUTTAL.

M. Shattuck.

Was recalled by plaintiff, and testified as follows:

I did not hear either McCusker or myself admit that was the line. I never did admit it. I admitted that there had been a stake there, but
154 I disputed that it had been put there by Terrell. I admitted that he had come within two or three feet of where it was, but that stake was put there before Terrell made his survey. It was put there at the preliminary survey. The termination of the upper line, where it strikes the river, runs over a narrow point, then crosses a narrow bottom, something between one and two chains—less than two chains. Then there is a bottom between the river and that little rise. I tried to get Stratton to go up with me to show him where the corner
165 was established by Terrell, but he refused to go. I then pointed out where the stake was. I told him that the stake, as established by Terrell, had been washed away, and that if he would come up with me, I would show him where it was situated, but he refused to do so. I do not recollect of calling McCusker's attention to the corner post, as I thought he knew it. That stake stood there some five years, until the winter of the high water, in

1861, or 1862 or 1863. It then went off, together
 166 with some fencing. There was a small portion of
 the land also washed away. The stake only marked
 the line. It stood about four feet high. I think it
 was marked "B. S. C." Whether there was a num-
 ber on it or not I could not say. There was one house
 there and the remains of another in 1858. The
 house stood about five or six chains from the
 Smith line. McCusker stated that there was no
 fence built there until 1860 or 1861, from the
 Stratton line up to the Smith line. How was
 that?

167 Question objected to by defendant. Objection
 overruled and defendant excepted, and his excep-
 tion was noted.

There was a fence running a good portion of
 the way. I built a portion of it in 1858, and a
 portion of it in 1859, and I might have built
 some of it later than that. There was no fence
 there at the end of the Smith line, or north 67°
 west of this ranch, when Stratton ran his line
 and established the west corner. There was a
 fence near that line that ran near bushes, some-
 where between three and four rods to where
 168 Terrell's stake was.

BEING CROSS-EXAMINED

By Mr. Brooks, he testified :

I told Stratton that he had got too near to the
 corner post of the preliminary survey. I under-
 took to explain it to him. There was two pre-
 liminary surveys made there. The preliminary

survey in which the stake was placed was made
169 before Terrell's survey.

This was all the testimony.

Thereupon the cause, after argument, was submitted to the Court, and, after due deliberation, the Judge rendered his decision, and directed a judgment in favor of the plaintiff.

170 And thereupon, within the time allowed by law for that purpose, the defendant gave notice of his intention to move for a new trial, stating therein, generally, the grounds of the motion, and he now files this his statement, within the time allowed by law for that purpose, and specifies the grounds of his motion:

First. Errors of law, occurring at the trial, and excepted to by the defendant.

1. Allowing the cause to be reinstated, after the same had been voluntarily dismissed as to the defendant Frisbie.

2. Allowing witness to prove that Smith located the land on the patent of the plaintiff in reference to the boundary line of the Pajaro Rancho.

3. Allowing McNamee to describe and bound
171 lots 5 and 6 from hearsay.

4. Allowing Shattuck to testify to what Terrell and others told him.

5. Allowing Peter McNamee to certify as to what Smith told him, and refusing to strike out his testimony.

6. Denying motion for nonsuit.

7. The conclusion of law, that the plaintiff

172 was entitled to judgment against defendant Frisbie.

8. The conclusion of law, that the plaintiff was entitled to judgment against the defendant, McCusker.

Second. And he specifies no particulars in which he alleges the evidence to be insufficient to justify the finding.

178 1. The evidence is insufficient to justify the finding that the true line of the Rancho Bolsa de San Cayetano, as surveyed and located by the Surveyor-General of the United States for California, was not as marked out by Stratton, but was as marked out by Smith.

2. The evidence is insufficient to justify the finding the post and station "B. S. C. 11," as located and established by the U. S. Deputy Surveyor, Terrell, in the former survey of the rancho, was at the point where the line run by Smith terminates at the Pajaro river, and not at the point where the line run by Stratton strikes the said river.

Third. That the decision is against law.

174 And inasmuch as the matters aforesaid do not appear by the record of said cause, the Hon. S. B. McKee, the Judge before whom said cause was tried, hath hereto, at the request of the defendant, set his hand and seal, in testimony that the same is a true, full and perfect statement, this 21st day of February, A. D. 1872.

S. B. MCKEE,
District Judge.

[TITLE OF COURT AND CAUSE.]

175

Stipulation.

It is stipulated and agreed that the map annexed to the patent of the Rancho Bolsa de San Cayetano form a part of the statement in these cases, and that a copy thereof shall be annexed to the statements and to the Transcript if an appeal be taken. That the motions for new trial be, and the same hereby are, submitted on the said statement and briefs to be filed, defendants to have 10 days to serve their brief, plaintiff's 15 days to serve brief, and defendants to 196 have 10 days after receipt thereof to reply. The map, Exhibit "A," to form a part of the statement, and that a copy thereof be annexed to the Transcript, if an appeal be taken.

B. S. BROOKS,
Attorney for Defendants.

A. CRAIG,
Attorney for Plaintiff.

(Endorsed) Filed June 4th, 1872.

177 [TITLE OF COURT AND CAUSE.]

Judge's Statement and Order Denying Motion for New Trial.

The history of this case is the same as that of McFarland *vs.* McCusker, just decided in this Court, and by stipulation of counsel, the testimony in one was made applicable to both.

The defendant's motion for a new trial came

on to be heard upon the complaint and answer,
 178 upon the statement and motion for a new trial,
 made and filed herein, and upon the deposition
 of one, J. T. Stratton, taken upon the part of de-
 fendant, by him used upon said trial, and now
 on file herein, and upon said record and full
 consideration thereof, the Court is of opinion,
 that the judgment heretofore rendered in said
 cause, in favor of plaintiff and against defendant,
 was, in all respects, correct, and that there was
 no error in the ruling of the Court upon the trial
 of said cause, or in the judgment rendered there-
 in.

179 Wherefore it is ordered that said motion for a
 new trial, be and the same is hereby denied.

San Jose, March 9th, 1874.

D. BELDEN,
 District Judge.

(Endorsed) Order denying motion for a new
 trial.

Filed March 12, 1874.

JOHN MARKLEY.
 Clerk.

180

[TITLE OF COURT AND CAUSE]

Notice of Appeal.

Please take notice, that the defendant in the
 above cause hereby appeal to the Supreme
 Court of the State of California, from the judg-
 ment made and rendered in said cause, and also

from the order made, entered and filed in said
 181 cause, the 12th day of March, A. D. 1874, denying
 said defendant's motion for a new trial, and from
 the whole thereof.

B. S. Brooks,
 Attorney for Defendants.

To the Clerk of said Court, and to A. Craig, Esq.,
 Plaintiff's Attorney, and Eliza McNamee.
 (Endorsed) Notice of Appeal.
 Filed April 18th, 1874.

JOHN MARKLEY,
 Clerk.

182

[TITLE OF COURT AND CAUSE.]

Affidavit of Service of Notice of Appeal.

STATE OF CALIFORNIA, } ss.
 Monterey County, } ss.

W. H. Webb, being first duly sworn, says:

First. That he is a white male citizen of the United States, over twenty-one years of age, and competent to be a witness on the trial of the above-entitled cause.

183 *Second.* That affiant's residence and place of business is at Salinas City, in the County of Monterey, State of California.

Third. That heretofore, to wit: on the 18th day of April, A. D. 1874, he filed with the Clerk of the above-mentioned District Court, in which judgment in said action is filed and entered, a notice of appeal from said judgment and from the order made, entered and filed in said cause

on the 12th day of March, A. D. 1874, denying
184 defendant's motion for a new trial, a true copy
of which said notice as aforesaid, marked Exhibit
"A," is hereto attached and made a part hereof.
And that, at the same time of filing said notice as
aforesaid, he, affiant, served a true copy of said
notice on A. Craig, Esq., who is the attorney of
record of said plaintiff and respondent in said
cause, by putting the said copy of said notice,
enclosed in a sealed envelope, duly stamped and
postage paid by United States postage stamps,
and then and there depositing the same in the
United States Post-office at Salinas City, County
185 of Monterey, State of California, addressed as
follows, to wit: "A. Craig, Attorney at Law,
Watsonville, Santa Cruz County, California."

Fourth. That the said A. Craig, Esq., is the
person on whom the service of said copy of said
notice was to be made, and that he resides in a
different place from the place in which resides
affiant, to wit: in the town of Watsonville, in
the County of Santa Cruz, State of California.

Fifth. That there is a regular daily communica-
tion by mail between the said places in which
186 said affiant resides, and the said place in which
the said A. Craig, attorney, as aforesaid, resides.

Sixth. And affiant further swears, that, at the
same time of filing said notice as aforesaid, he,
affiant, also served a true copy of said notice on
one Eliza McNamee, by putting the said copy of
said notice enclosed in a sealed envelope, duly
stamped and postage paid by United States post-
age stamps, and then and there deposited the

same in the United States Post-office, at Salinas
 187 City, County of Monterey, State of California,
 addressed as follows: Eliza McNamee, Watson-
 ville, Santa Cruz County, California.

Seventh. That the said Eliza McNamee resides
 in a different place from the place in which affiant
 resides, to wit: at or near the town of Watsonville,
 Santa Cruz County, State of California; that affiant is informed and verily believes, and
 upon such information and belief so states, that
 the said town of Watsonville, "Santa Cruz
 County, State of California," is the Post-office
 address of the said Eliza McNamee.

188 *Eighth.* That there is a regular daily communica-
 tion by mail between the said town of Watsonville,
 Santa Cruz County, State of California,
 and the said place in which affiant resides.

W. H. WEBB.

Subscribed and sworn to before me, this the
 18th day of April, A. D. 1874.

JOHN MARKLEY,
 County Clerk.

(Endorsed) Affidavit of service of notice of
 appeal.

189 Filed April 18th, 1874.

JOHN MARKLEY,
 Clerk.

—
 [TITLE OF COURT AND CAUSE.]

EXHIBIT "A."

Copy of Notice of Appeal.

Please take notice, that defendants in the
 above cause hereby appeal to the Supreme Court

190 of the State of California, from the judgment made and rendered in said cause, and also from the order made, entered and filed in the said cause, the day of March, A. D. 1874, denying said defendant's motion for a new trial therein, and from the whole thereof.

B. S. BROOKS,

Attorney for Defendants.

To the Clerk of said Court, and to A. CRAIG, Esq., Plaintiff's Attorney, and Eliza McNamee.

(Endorsed) Notice of Appeal, Exhibit "A," (and attached to) affidavit of service of appeal.

191 Filed April 18th, 1874.

JOHN MARKLEY,

Clerk.

STATE OF CALIFORNIA, } ss.
County of Monterey, }

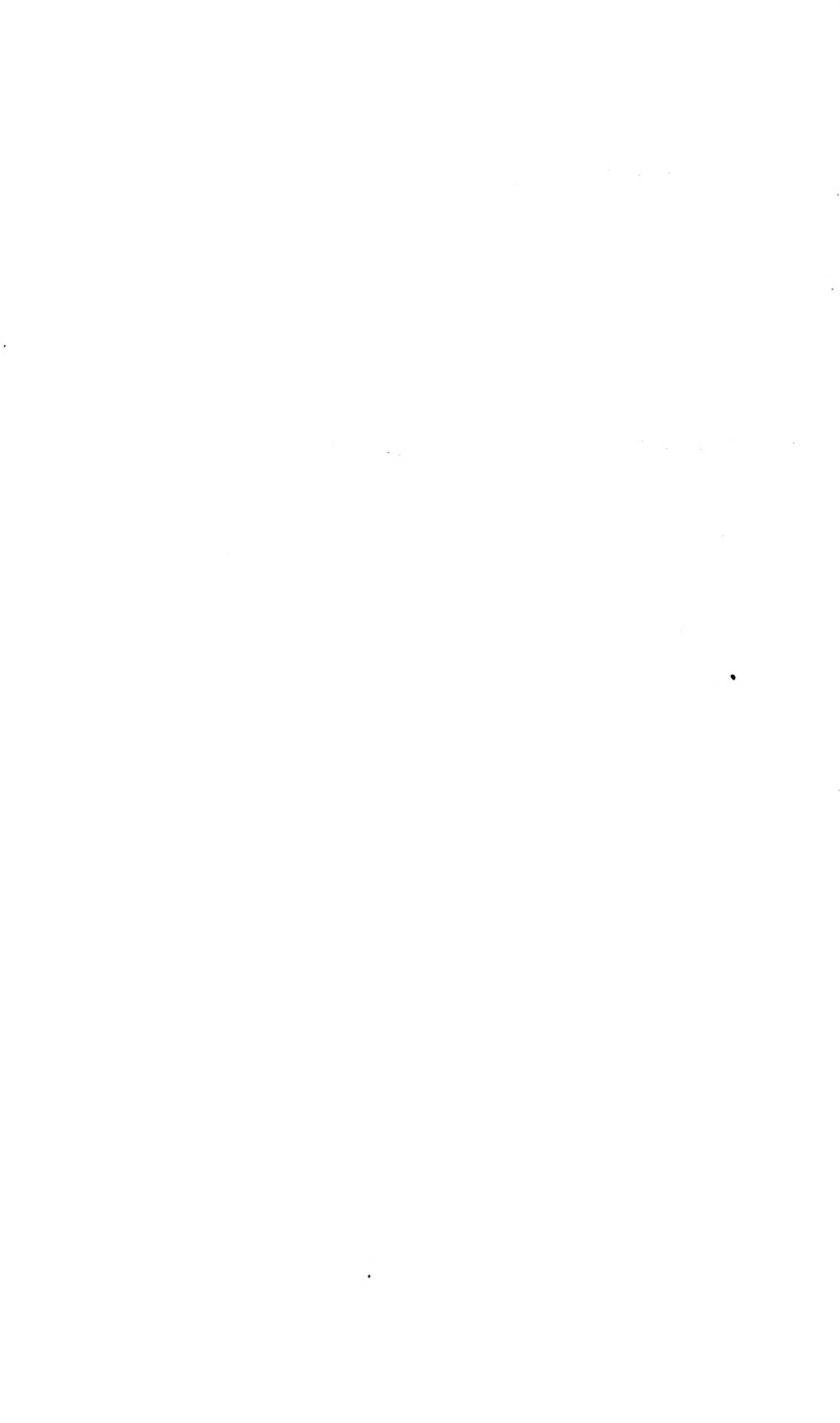
I, John Markley, County Clerk and *ex-officio* Clerk of the District Court of the Twentieth Judicial District, in and for the County of Monterey, State aforesaid, do hereby certify the foregoing printed Transcript on appeal to be correct, and that the papers and orders therein contained are true, full, and correct copies of the originals now on file and of record in said Court in said cause, and constitute all the papers and orders in said cause; and that said copies have been compared by me with the said originals, and are correct transcripts thereof, and of the whole of said originals.

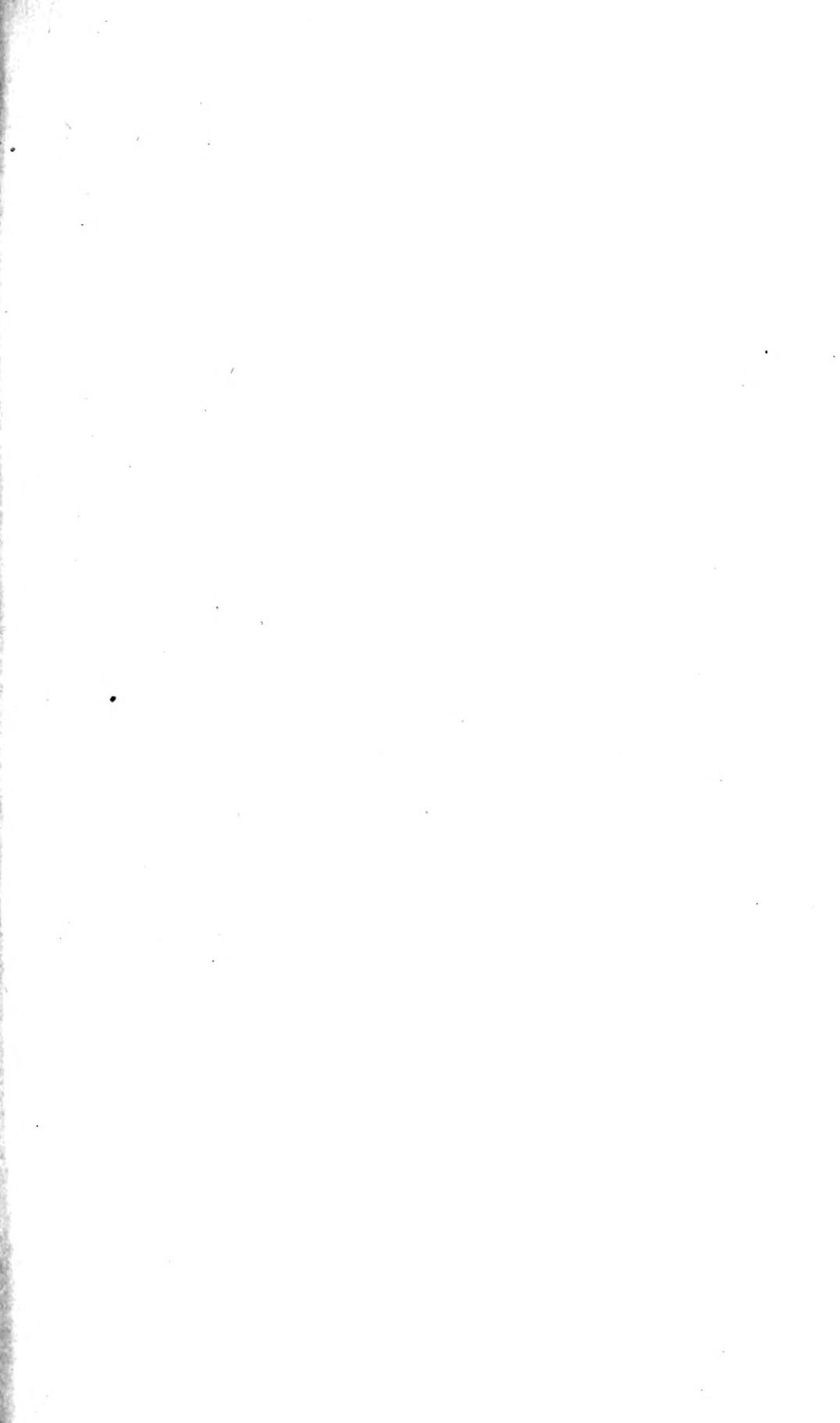
193 And I hereby further certify, that undertakings on appeal, in due form, conditioned according to the statute in such case provided, and in the penal amount fixed by order of the Court herein, and for the payment of costs on appeal, were properly filed by said appellants within the statutory time in said cause.

In witness whereof, I have hereunto set my hand, and affixed the seal of the District Court of the County of Monterey, this day of A. D. 1874.

194

Clerk.





7413



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